

<p>26</p> <p>1 fraction.</p> <p>2 JUDGE SHEEHAN: If there are no</p> <p>3 further questions on that issue, can we turn to</p> <p>4 your increment argument, increment consumption?</p> <p>5 I'll begin with Question E.</p> <p>6 The scheme set out you've certainly</p> <p>7 reflected in the NSR Manual is that</p> <p>8 increments are set after a baseline is set.</p> <p>9 And the baseline, 775, is nailed down. And</p> <p>10 then emissions after that consume increment</p> <p>11 or if emissions come offline after that time,</p> <p>12 the increment pot can grow.</p> <p>13 Page 10 of the manual, C-10 of the</p> <p>14 manual, says that emission increases that</p> <p>15 consume increment are those occurring after</p> <p>16 the baseline is set, not before. Your</p> <p>17 argument seems to be that you measure the</p> <p>18 actual emissions after the baseline, and then</p> <p>19 all of the emissions pre-baseline and</p> <p>20 post-baseline consume increment. Thus, you</p> <p>21 come up with a figure around 16,000 tons of</p> <p>22 increment consumed by the WEPCO-PIPP plant.</p>	<p>28</p> <p>1 definition of -- that doesn't fall within any</p> <p>2 of those definitions of actual emissions.</p> <p>3 And it doesn't fall within the research</p> <p>4 review manual's discussion either.</p> <p>5 JUDGE SHEEHAN: That's not</p> <p>6 quite -- we'll get to that. That's not quite</p> <p>7 what I was asking.</p> <p>8 Say, for example, you had a</p> <p>9 facility in 1970, say, and maybe 7 units of</p> <p>10 pollution, and the baseline was set in 1975.</p> <p>11 Sometime after that, there was a modification</p> <p>12 and another three -- additional three units</p> <p>13 of pollution were emitted. Would your</p> <p>14 argument be that the increment consumption at</p> <p>15 that point -- post-1975 -- was 3 units or 10,</p> <p>16 pulling in the original 7 as well?</p> <p>17 MR. BENDER: It would be the 24 months</p> <p>18 before the relevant data. And I think the</p> <p>19 relevant data is why that baseline is</p> <p>20 established. So --</p> <p>21 JUDGE SHEEHAN: So would the</p> <p>22 modification increment consumption include</p>
<p>27</p> <p>1 Can you explain your theory of how the</p> <p>2 increment principle works in the PSD world?</p> <p>3 MR. BENDER: Yes, Your Honor. The Act</p> <p>4 and the PSD rule distinguish between the major</p> <p>5 source baseline data and the minor source</p> <p>6 baseline data, and between the major sources and</p> <p>7 minor sources. And it says, the plain language</p> <p>8 is that the actual emissions as defined by the</p> <p>9 cross-references -- the regulatory</p> <p>10 definition -- from a major source constructed</p> <p>11 after the baseline data consumes increment. And</p> <p>12 that the only two possible definitions of actual</p> <p>13 emissions are the 24-month annual average or the</p> <p>14 potential to emit.</p> <p>15 And what we're saying in this case</p> <p>16 is DEQ did not do that. And what they claim</p> <p>17 to have done is say I've taken the difference</p> <p>18 between a single year, 1973, and another</p> <p>19 single year, 2006, taken the difference and</p> <p>20 determined that to be the amount of emissions</p> <p>21 from the -- entities' Preque Isle plant that</p> <p>22 consumes increment. And that's not the</p>	<p>29</p> <p>1 emissions that were set, that were included in</p> <p>2 the original baseline, or not?</p> <p>3 MR. BENDER: Maybe I'm not</p> <p>4 understanding, I'm sorry. The original</p> <p>5 baseline, are you referring to it as the '73</p> <p>6 emissions or the '75 emissions?</p> <p>7 JUDGE SHEEHAN: The seven units of</p> <p>8 pollution that were included in the original</p> <p>9 baseline. Would those seven units be included</p> <p>10 in the increment calculation post-baseline? Or</p> <p>11 would it just be the additional three that</p> <p>12 increase after the seven, after the baseline is</p> <p>13 set?</p> <p>14 MR. BENDER: It would be all.</p> <p>15 JUDGE SHEEHAN: All 10?</p> <p>16 MR. BENDER: All 10.</p> <p>17 JUDGE SHEEHAN: Then what happens to</p> <p>18 the -- you're double counting? Because the</p> <p>19 seven went into the original baseline, so you</p> <p>20 counted them then and now you count them as</p> <p>21 increment-consuming as well, so they're counted</p> <p>22 twice?</p>

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<p style="text-align: right;">30</p> <p>1 MR. BENDER: Well, the regulation says</p> <p>2 that they're not in the baseline, so they'd be</p> <p>3 increment -- those emissions from -- and the way</p> <p>4 the regulation reads is the actual emissions</p> <p>5 from the source. And it's not the modification.</p> <p>6 The regulations says the actual emissions from</p> <p>7 the source are outside the baseline in consumed</p> <p>8 increments. So they wouldn't be -- I think to</p> <p>9 answer your question, they wouldn't be in the</p> <p>10 baseline and increment consuming. They just</p> <p>11 wouldn't be in the baseline.</p> <p>12 JUDGE SHEEHAN: My question was that</p> <p>13 they were in the baseline. They were alive and</p> <p>14 well. They were out there at the time the</p> <p>15 baseline was calculated. So it seems natural</p> <p>16 that they would be having been included in the</p> <p>17 baseline. What would the baseline encompass if</p> <p>18 not actual emissions as of that point, as of</p> <p>19 1975?</p> <p>20 MR. BENDER: And the way Congress</p> <p>21 defined it is it's a concept that is -- whatever</p> <p>22 the -- it should be the air quality in the area</p>	<p style="text-align: right;">32</p> <p>1 there's a list of sources that are</p> <p>2 increment-consuming. Their emissions are</p> <p>3 modeled, and then that total from the</p> <p>4 increment-consuming source list is then compared</p> <p>5 to the increment. I'm not aware that the actual</p> <p>6 baseline concentration is a number that's</p> <p>7 calculated. It's a calculation of</p> <p>8 increment-consuming sources compared to the</p> <p>9 increment. So if a source is modified</p> <p>10 after -- a major source is modified, major</p> <p>11 modification, it qualifies as construction.</p> <p>12 JUDGE WOLGAST: But one thing I'm</p> <p>13 having trouble with is at the point that they</p> <p>14 establish the baseline, then an increment is</p> <p>15 calculated based on then-available new potential</p> <p>16 emissions that is the delta between the baseline</p> <p>17 and then the max itself to ensure that the area</p> <p>18 stays in attainment. The increment then -- I'm</p> <p>19 just -- I'm having a lot of trouble with the</p> <p>20 fact that when you pull any new facility or any</p> <p>21 new modification that then gets sort of taken</p> <p>22 out of the pre-baseline and then moved over to</p>
<p style="text-align: right;">31</p> <p>1 or the modeling representative of the air</p> <p>2 quality in the area, but then there's provisions</p> <p>3 or provisos to that. And some things are</p> <p>4 subtracted from the baseline if certain events</p> <p>5 occur. And one of those events is construction,</p> <p>6 which is then defined to include a modification.</p> <p>7 So a source that is -- a major source that is</p> <p>8 constructed or modified after '75 is, by that</p> <p>9 definition, not within the baseline</p> <p>10 concentration.</p> <p>11 JUDGE SHEEHAN: But if there</p> <p>12 was -- yes, go ahead.</p> <p>13 JUDGE WOLGAST: Are you saying then</p> <p>14 that you would recalculate the baseline at that</p> <p>15 point as well as the increment? When you have a</p> <p>16 modification post-establishment of the baseline,</p> <p>17 are you saying you'd recalculate the baseline?</p> <p>18 MR. BENDER: Conceptually, that's what</p> <p>19 happens. But I would note that when the</p> <p>20 modeling is done for the PSD permitting, the</p> <p>21 modeling is just of the increment and it's</p> <p>22 compared to whatever the increment is. And so</p>	<p style="text-align: right;">33</p> <p>1 the other side of the ledger, in my mind,</p> <p>2 increment would not have been calculated the way</p> <p>3 it was, if in fact all of those emissions now</p> <p>4 are moving from one side of the ledger to the</p> <p>5 other side of the ledger.</p> <p>6 MR. BENDER: I think -- to answer your</p> <p>7 question, the increment is established in the</p> <p>8 regulations. For example, a 24-hour SO<sub>2</sub> is 5</p> <p>9 microns per cubic liter. When a permit</p> <p>10 application comes in, the permit applicant</p> <p>11 identifies what's called map sources. All</p> <p>12 sources will be modeled for map compliance.</p> <p>13 It also identifies PSD</p> <p>14 increment-consuming sources. And those PSD</p> <p>15 increment-consuming sources are then used to</p> <p>16 run a separate and additional modeling</p> <p>17 result. And that modeling result is compared</p> <p>18 to the increment, the 5 microns. And so what</p> <p>19 you're doing is you're just making your PSD</p> <p>20 increment-consuming sources list more</p> <p>21 inclusive by including those sources that</p> <p>22 major modifications -- major modified sources</p>

<p style="text-align: right;">34</p> <p>1 that were modified after the baseline date.</p> <p>2 That source would be included in</p> <p>3 that modeling runs of the PSD sources. Then</p> <p>4 that result is compared to the increment</p> <p>5 threshold, so it'd be the 5 microns, for</p> <p>6 example, in the class 1 monitor.</p> <p>7 JUDGE REICH: I go back one step. I</p> <p>8 understand, I think, the significance of whether</p> <p>9 something was in or not in based on -- but how</p> <p>10 is the baseline calculation used? What is the</p> <p>11 significance of the number you would generate by</p> <p>12 generating a baseline calculation?</p> <p>13 MR. BENDER: I see my time is up, Your</p> <p>14 Honor. I think that answer in the way that I</p> <p>15 understand it is these permit applications and</p> <p>16 analysis are wrong is that the baseline does not</p> <p>17 figure. The application doesn't identify what</p> <p>18 the baseline was.</p> <p>19 It only identifies what the</p> <p>20 increment consumption is and then compares</p> <p>21 that to the --</p> <p>22 JUDGE REICH: So you're saying whether</p>	<p style="text-align: right;">36</p> <p>1 used for the permit limits, permit limits, to</p> <p>2 align with the NAAQS and increment standard</p> <p>3 limits in average periods, that the PM and SOX</p> <p>4 average periods in the permit were generally</p> <p>5 longer, more hours than the very short NAAQS</p> <p>6 increment standard time periods.</p> <p>7 The response to comments by NMU is</p> <p>8 certainly not very detailed. But in their</p> <p>9 brief, they make the argument that they did</p> <p>10 do the calculation that you asked for after</p> <p>11 all and it came up with 87 pounds per hour.</p> <p>12 And that reflects short-term emission limits.</p> <p>13 What's wrong with that?</p> <p>14 MR. BENDER: The 87 pounds per hour is</p> <p>15 not an hourly limit and it's not a maximum</p> <p>16 theoretical emission. Instead, it's taking the</p> <p>17 24 -- my understanding it's taken a 24-hour</p> <p>18 limit or the 24-hour emissions, assuming the 2</p> <p>19 pounds per million BTU SO2 limit, for example,</p> <p>20 and dividing it by 24. So it assumes that the</p> <p>21 24-hour limit is actually a 1-hour limit,</p> <p>22 enforceable on a 1-hour period, but it's not.</p>
<p style="text-align: right;">35</p> <p>1 this was still included or backed out of the</p> <p>2 baseline wouldn't have any real significance?</p> <p>3 The only real significance is whether it's</p> <p>4 counted towards the increment.</p> <p>5 MR. BENDER: Right. The significance</p> <p>6 of it is whether or not it counts towards which</p> <p>7 sources -- consumed increment are included in</p> <p>8 that --</p> <p>9 JUDGE REICH: Right. But it's a focus</p> <p>10 on consuming increment, not being or not being</p> <p>11 part of the baseline.</p> <p>12 MR. BENDER: Right. I don't think</p> <p>13 identifying what that baseline was as a number</p> <p>14 in 1975 or today is critical or -- I don't even</p> <p>15 know that it's looked at. Instead, what it's</p> <p>16 focused on the amount of increment and how much</p> <p>17 will exist. Thank you.</p> <p>18 JUDGE SHEEHAN: I think I'd like to</p> <p>19 hold you up for a few more minutes if I could, a</p> <p>20 few more areas yet to go through. Modeling?</p> <p>21 You seem to be arguing that the -- to take an</p> <p>22 example, PM and SO2, that the average periods</p>	<p style="text-align: right;">37</p> <p>1 You know, within that 24-hour period, the source</p> <p>2 could still comply with the 24-hour average and</p> <p>3 have double the hour emission rates as long as</p> <p>4 it made up for that during the 24-hour period by</p> <p>5 reducing operations or burning of cleaner fuel,</p> <p>6 such as wood. There's no protection in the</p> <p>7 limits of a certain average because the limits</p> <p>8 aren't enforceable that short-term --</p> <p>9 JUDGE SHEEHAN: So what they claim is</p> <p>10 a 1-hour limit, you're saying is in reality a</p> <p>11 24-hour limit?</p> <p>12 MR. BENDER: That's correct. When you</p> <p>13 look at the permit, Your Honor, there's for PM</p> <p>14 -- or SO2, for example, there's a 30-day and a</p> <p>15 24-hour limit. There's no hour limit, there's</p> <p>16 no 3-hour limit, which is different from what</p> <p>17 many permitting sources or permitting agencies</p> <p>18 do. And I think we included one example as an</p> <p>19 exhibit where the agency will set limits -- a</p> <p>20 30-day limit, an annual limit maybe, 24-hour</p> <p>21 limit, and a 3-hour limit -- and it will model</p> <p>22 each of those for the relevant mass and</p>

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<p style="text-align: right;">38</p> <p>1 increment. And that's consistent with the NSR</p> <p>2 Manual that says model with the maximum, either</p> <p>3 the maximum physical capacity or the enforceable</p> <p>4 limit, when there is an enforceable limit that</p> <p>5 corresponds to the average in the period.</p> <p>6 JUDGE SHEEHAN: Thank you. Lastly,</p> <p>7 turning to the Class 1 increment issue.</p> <p>8 MR. BENDER: Yes.</p> <p>9 JUDGE SHEEHAN: The NSR Manual sets</p> <p>10 out a 1-microgram limit as far as a trigger for</p> <p>11 the Class 1 analysis goes. You seem to think</p> <p>12 that's -- I guess you argue in your brief it's</p> <p>13 unlawful. Is there any limit existing in your</p> <p>14 mind that's so low that no analysis needs to be</p> <p>15 done, or any distance so great from the source</p> <p>16 to the area of impact, the Class 1 impact area,</p> <p>17 that would not require the Class 1 analysis to</p> <p>18 be done?</p> <p>19 MR. BENDER: I think the act prohibits</p> <p>20 any contribution to a violation. So I think</p> <p>21 under the act, that's the only option.</p> <p>22 If your question is whether</p>	<p style="text-align: right;">40</p> <p>1 there are numerous power plants. And there's</p> <p>2 two power plants of numerous units at each in</p> <p>3 Marquette, Michigan. There are mining</p> <p>4 operations there. There's this boiler and there</p> <p>5 are power plants in Northern Wisconsin as well.</p> <p>6 I mean, when you include all of those, all of</p> <p>7 those increment-consuming sources, it's</p> <p>8 certainly foreseeable.</p> <p>9 JUDGE SHEEHAN: What about the</p> <p>10 practical reality here that the state did</p> <p>11 contact the federal land managers at Seney and</p> <p>12 Isle Royale, both of whom said we don't have a</p> <p>13 problem.</p> <p>14 MR. BENDER: I think that was the for</p> <p>15 the AQRV analysis, Your Honor. And the AQRV</p> <p>16 analysis and the increment analysis need to be</p> <p>17 run separately. And there's no authority in the</p> <p>18 act or in the regulations or in any guidance I'm</p> <p>19 aware of for the federal land manager to waive</p> <p>20 the increment analysis. The act is pretty clear</p> <p>21 that to be able to obtain a permit, the</p> <p>22 applicant has to demonstrate compliance with</p>
<p style="text-align: right;">39</p> <p>1 actively speaking, is there anything that's</p> <p>2 de minimis, that there's such a low</p> <p>3 concentration, I think if there is, it's much</p> <p>4 lower than what was actually modeled for this</p> <p>5 plant. This plant model had a 0.42 microns</p> <p>6 per cubic meter for 24-hour SO2. That's over</p> <p>7 8 percent of the relevant increment. When</p> <p>8 the EPA has proposed in the past to do</p> <p>9 significant impact levels by rule, it has</p> <p>10 used a metric of 4 percent of the relevant</p> <p>11 increments. So based on that standard, which</p> <p>12 I think is still too high, even based on that</p> <p>13 metric, this is still double that.</p> <p>14 JUDGE SHEEHAN: So it's less than half</p> <p>15 of what the NSR Manual sets out, but it's still</p> <p>16 in your mind unacceptable?</p> <p>17 MR. BENDER: That's right, Your Honor.</p> <p>18 The NSR Manual, and I note that it's included in</p> <p>19 a footnote in the NSR Manual, but the NSR Manual</p> <p>20 is 24-hour 1-micron standard. It's 20 percent</p> <p>21 of the entire increment for all</p> <p>22 increment-consuming sources in an area where</p>	<p style="text-align: right;">41</p> <p>1 increment. They cannot cause or contribute to a</p> <p>2 violation of increment.</p> <p>3 JUDGE SHEEHAN: So you're saying that</p> <p>4 the state did not provide all the information to</p> <p>5 the land managers at Seney and Isle Royale?</p> <p>6 MR. BENDER: What I'm saying is that</p> <p>7 the state did not conduct an increment analysis</p> <p>8 to know whether or not the increment was</p> <p>9 violated or not. Based on the model</p> <p>10 concentration that they did run, the screening</p> <p>11 model, it showed 8 percent, which is a pretty</p> <p>12 significant number for the entire increment in</p> <p>13 that Class 1 area to know whether the increment</p> <p>14 itself has been violated or not. Just didn't</p> <p>15 run that model to know.</p> <p>16 JUDGE REICH: Okay, thank you. Mr.</p> <p>17 Gordon?</p> <p>18 MR. GORDON: Good morning.</p> <p>19 JUDGE REICH: Good morning.</p> <p>20 MR. GORDON: I'd like to reserve 5</p> <p>21 minutes of the 30 minutes that I'm allotted for</p> <p>22 rebuttal.</p>

<p style="text-align: right;">42</p> <p>1 Your Honors, Petitioner identifies</p> <p>2 a whole range of issues on which they</p> <p>3 disagree with the conclusions of the Michigan</p> <p>4 Department of Environmental Quality. And I</p> <p>5 think it's important to remember before we</p> <p>6 get into the specific issues what the</p> <p>7 standard of review here is. And that is that</p> <p>8 they have to demonstrate that there's been a</p> <p>9 clear error.</p> <p>10 I think when we delve into each of</p> <p>11 the individual issues, you'll find that there</p> <p>12 actually hasn't been any demonstration of</p> <p>13 clear error. In fact, when you look at them</p> <p>14 carefully, they haven't actually shown any</p> <p>15 issue at all. They've simply demonstrated</p> <p>16 that they don't agree with the way the DEQ</p> <p>17 went about its analysis.</p> <p>18 There are a whole host of issues.</p> <p>19 I'm going to present them, if it would please</p> <p>20 the Court, in the order in which they were</p> <p>21 arranged, if that's fine with you.</p> <p>22 JUDGE SHEEHAN: As sort of a general</p>	<p style="text-align: right;">44</p> <p>1 JUDGE SHEEHAN: But if we turn in that</p> <p>2 regard to storage, Mr. Kucera, could you put up</p> <p>3 the facility design document submitted by the</p> <p>4 state here? There's the facility.</p> <p>5 Let me ask you questions, if I may,</p> <p>6 Mr. Gordon, about that. In the center near</p> <p>7 the bottom, you see the wood silo capacity,</p> <p>8 which appears to be a fairly large area</p> <p>9 compared to the coal silo, which is above and</p> <p>10 to the left of the wood silo, the little</p> <p>11 square building? The storage area for wood</p> <p>12 generally, including the silo and to the</p> <p>13 right, the handling building and the wood</p> <p>14 hopper, appear much larger than the coal</p> <p>15 storage area. Is that accurate that there's</p> <p>16 a lot more capacity to store wood than coal,</p> <p>17 as seems to be reflected here in this design?</p> <p>18 MR. GORDON: Well, I think the</p> <p>19 question is how many days of capacity it is.</p> <p>20 And what the university submitted in its permit</p> <p>21 application was that the storage capacity at</p> <p>22 this site for coal and for wood is a three-day</p>
<p style="text-align: right;">43</p> <p>1 backdrop question, the very first page of the</p> <p>2 application said that the intention was for the</p> <p>3 CFB to operate 100 percent on wood. Then per an</p> <p>4 addendum several months later, you also repeated</p> <p>5 that general thought that the primary fuel would</p> <p>6 be wood. Then you turned to the fact sheet in</p> <p>7 the permit and you see, as was earlier</p> <p>8 indicated, coal 22 days per month. Wood</p> <p>9 obviously seven or eight days. How do you</p> <p>10 square not necessarily a legal issue, but how do</p> <p>11 you square the proclamation of your intention to</p> <p>12 use so much wood, and then, in reality, seems to</p> <p>13 be anything but?</p> <p>14 MR. GORDON: I think the basis for the</p> <p>15 mix of coal and wood that are to be burned at</p> <p>16 the facility and on which the SO2 emission</p> <p>17 limits are based is based on two factors: One,</p> <p>18 it's based on the limited storage capacity for</p> <p>19 any fuel at the facility, be it wood or coal;</p> <p>20 and two, it's based on the reality that the wood</p> <p>21 fuel deliveries during those winter months will</p> <p>22 be disrupted.</p>	<p style="text-align: right;">45</p> <p>1 fuel supply for each of those separately. Three</p> <p>2 days fuel supply of wood.</p> <p>3 JUDGE SHEEHAN: Your papers did not</p> <p>4 say separately. It said three days fuel supply</p> <p>5 without any differentiation between them.</p> <p>6 MR. GORDON: Their permit application</p> <p>7 indicates that there's two silos, and that it is</p> <p>8 a three-day supply for wood and a three-day</p> <p>9 supply for coal. And I don't know on this map,</p> <p>10 on this schematic, does it indicate that the</p> <p>11 wood silo building is of a larger area than of</p> <p>12 the coal silo, coal storage area? It is a silo.</p> <p>13 Yes. I think the question is, is</p> <p>14 there anything in the record to demonstrate</p> <p>15 that the capacity is less than a three-day</p> <p>16 storage capacity, as represented? And DEQ --</p> <p>17 JUDGE SHEEHAN: Well, let's talk about</p> <p>18 capacity. If you look to say Lot 19 up there at</p> <p>19 the top and to the left -- Mr. Kucera, could you</p> <p>20 slide, yes, to the left just to Lot 22, which is</p> <p>21 the large area. If you could slide it the other</p> <p>22 -- there we go. So Lot 19 and Lot 22 appear</p>

12 (Pages 42 to 45)

<p style="text-align: right;">46</p> <p>1 both vast and empty. The area around the Ripley</p> <p>2 Heating Plant in the top right corner has a</p> <p>3 buffer to the top and right, but also appears</p> <p>4 large and vacant. Why is it that the storage</p> <p>5 capacity is so stringent and constricted, as you</p> <p>6 indicate, when your own map seems to indicate</p> <p>7 anything but?</p> <p>8 MR. GORDON: Frankly, I don't know if</p> <p>9 it's fair to conclude that those large -- those</p> <p>10 maps are vacant, to be honest with you. I think</p> <p>11 --</p> <p>12 JUDGE SHEEHAN: There's nothing on</p> <p>13 them like there is in the rest --</p> <p>14 MR. GORDON: There's nothing on them</p> <p>15 represented in this schematic, but in this</p> <p>16 diagram --</p> <p>17 JUDGE SHEEHAN: Well, that's the</p> <p>18 record you gave us. What else do we have to go</p> <p>19 from?</p> <p>20 MR. GORDON: I think it's based on the</p> <p>21 representation of the university as to the</p> <p>22 diagram represents what's at the Ripley Fuel</p>	<p style="text-align: right;">48</p> <p>1 there was clear error in that regard.</p> <p>2 JUDGE SHEEHAN: Well, it could well be</p> <p>3 that it's true there is a three-day storage</p> <p>4 capacity for the areas denominated for storage.</p> <p>5 But it doesn't mean that there aren't other</p> <p>6 areas available for storage that simply weren't</p> <p>7 used.</p> <p>8 MR. GORDON: You know, I suppose we</p> <p>9 could speculate that there, you know, someplace</p> <p>10 a block away, two blocks away, there may be. As</p> <p>11 to what that would mean in terms of</p> <p>12 reconfiguring the plant in terms of being able</p> <p>13 to then have a conveyor to actually have the</p> <p>14 wood from a facility two blocks away, a storage</p> <p>15 facility two blocks away, being able to feed</p> <p>16 that into the boiler, those are all issues that,</p> <p>17 frankly, were not presented in the record. I</p> <p>18 think the question here is --</p> <p>19 JUDGE REICH: Well, who's burden is</p> <p>20 it? I mean, if a central part of the BACT</p> <p>21 analysis relates to storage, is there really</p> <p>22 someone like Sierra Club's burden to find and</p>
<p style="text-align: right;">47</p> <p>1 Heating Plant.</p> <p>2 I don't think they endeavored to</p> <p>3 try to show what's on other lots. As I read</p> <p>4 their application, they're not diagraming and</p> <p>5 indicating every structure on adjacent lots.</p> <p>6 JUDGE SHEEHAN: Well, it certainly</p> <p>7 raises the question -- there was no way that</p> <p>8 evidently the university really attempted to</p> <p>9 really clarify for us the true facts on the</p> <p>10 ground there. And what they did give us appears</p> <p>11 to show that there's a lot less storage</p> <p>12 capacity.</p> <p>13 MR. GORDON: I don't think so. I</p> <p>14 think the representation on the record is that</p> <p>15 the capacity of what is for storage for each of</p> <p>16 those fuels is three days. The DEQ examined it.</p> <p>17 It looked at that issue and that -- there's</p> <p>18 nothing to contradict that other than, I</p> <p>19 suppose, a potential surmise that maybe you</p> <p>20 could have something on some adjacent lot. But</p> <p>21 that's not -- there's nothing in the record to</p> <p>22 actually demonstrate and overcome to show that</p>	<p style="text-align: right;">49</p> <p>1 make arguments for additional storage or is it</p> <p>2 not your burden as the permit issuer to explore</p> <p>3 what possibilities exist for storage that would</p> <p>4 allow for a more stringent limit and make a</p> <p>5 determination as to whether those possibilities</p> <p>6 are there or not?</p> <p>7 MR. GORDON: I think when you apply</p> <p>8 that question to this case, the burden is on the</p> <p>9 Sierra Club here. Here, the record demonstrates</p> <p>10 the permit application --</p> <p>11 JUDGE REICH: I'm not talking about</p> <p>12 the appeal stage. I'm talking about at the</p> <p>13 basic permit issuance stage.</p> <p>14 MR. GORDON: Permit issuance stage.</p> <p>15 The information presented to the DEQ is that the</p> <p>16 capacity of storage at this facility is three</p> <p>17 days of wood here.</p> <p>18 JUDGE REICH: And you have no</p> <p>19 independent obligation to verify that</p> <p>20 information?</p> <p>21 MR. GORDON: No, DEQ reviewed it and</p> <p>22 considered whether there was room for more</p>

<p style="text-align: right;">50</p> <p>1 storage capacity at this facility.</p> <p>2 JUDGE REICH: So you did consider</p> <p>3 whether there was room for more? You did an</p> <p>4 independent analysis to that and that</p> <p>5 independent analysis is part of the record?</p> <p>6 MR. GORDON: I think what DEQ -- it</p> <p>7 shows that the DEQ reviewed it, reviewed their</p> <p>8 permit application. The response to comments</p> <p>9 says that based on the review of it, they were</p> <p>10 satisfied that in fact, that was the capacity.</p> <p>11 In those circumstances, I think it's incumbent</p> <p>12 upon the Petitioner to say no, there's something</p> <p>13 wrong with that. You didn't actually look at X,</p> <p>14 Y, and Z. And if you had looked at X, Y, and Z,</p> <p>15 there would be clear error.</p> <p>16 JUDGE REICH: Do you know --</p> <p>17 MR. GORDON: And they haven't done</p> <p>18 that here.</p> <p>19 JUDGE REICH: Is there anything in the</p> <p>20 record that actually is an analysis, or is there</p> <p>21 just the recitation that you looked at it and</p> <p>22 reached this conclusion?</p>	<p style="text-align: right;">52</p> <p>1 application had come in describing the boiler</p> <p>2 precisely the same way it did, it never</p> <p>3 mentioned wood, that as part of the BACT</p> <p>4 analysis, you would have had to consider wood as</p> <p>5 an option in terms of fuel?</p> <p>6 MR. GORDON: You know, I think the</p> <p>7 question as to other -- given the physical</p> <p>8 circumstances and the physical capabilities of</p> <p>9 the boiler, whether it can in fact burn other</p> <p>10 fuels is something that you would then -- you</p> <p>11 have to perform doing a top-down BACT analysis</p> <p>12 as to the technological availability. Is it</p> <p>13 available? You know, the technological</p> <p>14 feasibility -- I mean, CFBs can burn other</p> <p>15 fuels. I think that's one of their advantages.</p> <p>16 Then the question is, I think you</p> <p>17 would need to perform your top-down BACT</p> <p>18 analysis.</p> <p>19 JUDGE SHEEHAN: One other question</p> <p>20 while I have the scheme up there, the design.</p> <p>21 You indicate that there's no room on-site to</p> <p>22 take anything but Marquette or Presque coal,</p>
<p style="text-align: right;">51</p> <p>1 MR. GORDON: I think the information</p> <p>2 that's in the record as to the capacity is,</p> <p>3 frankly, the information, primarily what's in</p> <p>4 there, in their permit application as to how the</p> <p>5 facility will be configured, the fact that</p> <p>6 there's not only fuel storage, but you have to</p> <p>7 take into account when you have fuel storage how</p> <p>8 you're going to feed that fuel on the facility</p> <p>9 grounds into the boiler.</p> <p>10 I mean, there's a schematic I</p> <p>11 think, and the diagram reflects not only the</p> <p>12 silos, but also the actual area that you need</p> <p>13 for delivery, the area that you need to then</p> <p>14 store it, the area that you need to take it</p> <p>15 from the storage and feed it into the boiler.</p> <p>16 When you take all of that into account, I</p> <p>17 think the record shows that in fact, the</p> <p>18 capacity is a fuel storage capacity.</p> <p>19 JUDGE REICH: Can I ask a different</p> <p>20 question while I still have the floor? Do you</p> <p>21 agree with the position put forth by Sierra Club</p> <p>22 -- and if not, why not -- that if this</p>	<p style="text-align: right;">53</p> <p>1 which I'll refer to as MPI coal. There seems to</p> <p>2 be no differentiation in even the coal storage</p> <p>3 area between one kind of coal and another.</p> <p>4 Where does the statement in the record come to</p> <p>5 the effect that there's no room for any other</p> <p>6 kind of coal but those two?</p> <p>7 MR. GORDON: I don't think the</p> <p>8 contention is that there's no room or -- for any</p> <p>9 other type of coal. I think what the university</p> <p>10 represented in its application was that it was</p> <p>11 going to burn coal from two other sources. I</p> <p>12 shouldn't say "two other," from two sources:</p> <p>13 Either the Wisconsin Electric Presque Isle power</p> <p>14 plant or the other utility that's in the area,</p> <p>15 the Marquette Board of Light and Power. And so</p> <p>16 the analysis then in terms of we're getting into</p> <p>17 this issue as to who are the -- was the SO2</p> <p>18 emission limit based on the lowest sulfur --</p> <p>19 JUDGE SHEEHAN: Wait, let's talk about</p> <p>20 your statement. You used the word "will," which</p> <p>21 does come from the permit application. It does</p> <p>22 come from the evaluation form. Both say that</p>